Supreme Court, U.S.
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NO. 00-627

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN ALAN EMERSON,

Petitioner,

vs.

STANLEY TUGGLE and THURBERT BAKER,

Respondents.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals lacked authority to construe the Petitioner's notice of appeal as a motion for certificate of appealability.[1]

2. Whether the circuit judge lacked authority to address the issue of whether a certificate of appealability should be granted to the Petitioner.

3. Whether the decision of a single circuit judge concerning a certificate of appealability is subject to review by the entire court of appeals.

4. Whether the case record substantially shows that the Petitioner was denied federal constitutional rights by the state courts.

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1 Petitioner filed two separate notices of appeal in the Eleventh Circuit Court of Appeals. *See* Petitioner's Notice of Appeal, No. 99-12581-I and Petitioner's Notice of Appeal, No. 99-14640-I. In his Brief in Support of his Petition for Writ of Certiorari, Petitioner states that the judge did not indicate which notice of appeal (No. 99-12581-I or No. 99-146401-I) the Eleventh Circuit construed as a motion for a certificate of appealability. However, as this Brief explains, the first Question Presented to this Court by Petitioner can only involve Petitioner's First Notice of Appeal. As a result, Respondent objects to Petitioner's first Question Presented to the extent that it applies to both Notices of Appeal.

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Petitioner has included as Appendix A, a copy of the Order from the United States Court of Appeals for the Eleventh Circuit denying Petitioner's Certificate of Appealability No. 99-12581-I, dated July 17, 2000. Petitioner has included as Appendix B, a copy of the Order from the United States Court of Appeals for the Eleventh Circuit denying Petitioner's Certificate of Appealability No. 99-12581-I, dated April 21, 2000. Petitioner has included as Appendix C, a copy of the Order from the United States Court of Appeals for the Eleventh Circuit dismissing Petitioner's Appeal No. 99-14640-I, dated May 30, 2000. Petitioner has included as Appendix D, a copy of the Order from the United States District Court denying Petitioner's Motion for a Certificate of Probable Cause, dated October 4, 1999. Petitioner has included as Appendix E, the Judgment denying Petitioner's request for a Writ of Habeas Corpus dated June 15, 1999. Petitioner has included as Appendix F, the Order of the United States District Court adopting the Report and Recommendation of the Magistrate Judge, dated June 10, 1999. Finally, Petitioner has included as Appendix G, a copy of the Report and Recommendation by the Magistrate Judge, United States District Court, denying Petitioner's request for a Writ of Habeas Corpus, dated May 17, 1999.

Respondent includes as Appendix H, attached hereto the Opinion of the Georgia Court of Appeals in Emerson v. State, 222 Ga.App. 596, 474 S.E.2d 638 (1996).

STATEMENT OF JURISDICTION

Respondent agrees with Petitioner's representation that this Court has jurisdiction under 28 U.S.C. § 1254(1) to review the denial of applications for certificates of appealability by a circuit judge or a panel of a court of appeals. *See* Hohn v. United States, 524 U.S. 236, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. § 1254(1)
2. 28 U.S.C. § 2253 (c)
3. Supreme Court Rule 15(2)
4. Federal Rule of Appellate Procedure 1(a)
5. Federal Rule of Appellate Procedure 22(b)
6. Federal Rule of Appellate Procedure 27(c)
7. Federal Rule of Appellate Procedure 35(a)
8. Federal Rule of Appellate Procedure 47(a)(1)
9. 11th Circuit Rule 22-1(c)
10. 11th Circuit Rule 27-1(d)(2) and (e)
11. 11th Circuit Rule 35-4

I. PROCEDURAL HISTORY

A. *State Court Proceedings*

On March 9, 1994, a Clayton County, Georgia grand jury returned indictment number 94-CR 1075-8 against Petitioner charging him with one count of aggravated assault. (App. G at 38). While represented by counsel, Petitioner was tried in the Clayton County Superior Court and convicted of a lesser offense of misdemeanor battery. *See* Emerson v. State, 222 Ga.App. 596, 474 S.E.2d 638 (1996). (App. G). In response, Petitioner filed a Motion for New Trial alleging that "(1) the court erred in (a) instructing the jury on battery, (b) refusing the defendant's request to instruct the jury on accident; (2) trial counsel rendered ineffective assistance; and (3) the evidence was insufficient to support the battery conviction." (App. G at 39). Petitioner also filed a Motion in Arrest of Judgment. Both motions were denied. (App. G at 39).

Petitioner appealed his conviction to the Georgia Court of Appeals. The Georgia Court of Appeals affirmed Petitioner's conviction and held that 1) the "trial court did not commit reversible error by instructing the jury on battery because [Petitioner's] counsel requested the charge;" 2) Defense counsel's request for a jury charge on battery did not constitute ineffective assistance of counsel; and 3) Defense counsel's failure to request jury charges on self-defense and accident did not constitute ineffective assistance of counsel because the evidence did not support such charges. Emerson, 222 Ga.App. at 596, 474 S.E.2d at 639-640. Petitioner later filed a Motion for Reconsideration in the Georgia Court of Appeals and a Petition for a Writ of Certiorari in the Georgia Supreme Court. Emerson, 222 Ga.App. at 596, 474 S.E.2d at 639. The Georgia Court of Appeals and the Georgia Supreme Court denied these requests for further review.

B. ***Federal Court Proceedings***

In January of 1997, Petitioner filed a request in the United States District Court for the Northern District of Georgia (hereinafter referred to as the "District Court") seeking the issuance of a writ of habeas corpus. The District Court denied the Petition for Writ of Habeas Corpus on or about June 10, 1999. (App. F). The District Court, adopting the magistrate judge's report and recommendation, held that 1) Petitioner's counsel was not ineffective; and 2) the trial court did not violate Petitioner's due process rights. (App. F and G).

Almost a month later on July 14, 1999, Petitioner filed a Motion for a Certificate of Probable Cause[2] in the District Court, as required by 28 U.S.C. § 2253(c)(1). The District Court denied Petitioner's Motion for a Certificate of Probable Cause because Petitioner failed to substantially show the denial of a constitutional right. (App. D).

Instead of filing an application for a certificate of appealability with the District Court as required by 28 U.S.C. § 2253, Petitioner filed two separate notices of appeal. Petitioner filed his first notice of appeal on July 14, 1999 and his second notice of appeal on November 30, 1999.

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2 Prior to the adoption of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a certificate of probable cause was required under 28 U.S.C. § 2253. Now 28 U.S.C. § 2253 provides that a judge must issue a certificate of appealability to appeal a district court's denial of a writ of habeas corpus. *See* 28 U.S.C. § 2253(c). A certificate of probable cause and a certificate of appealability require analytical determinations and are judged under the same standard. United States v. Monroe, 974 F.Supp. 1472 (N.D.Ga. 1997).

Petitioner filed his first notice of appeal from the District Court's decision to deny Petitioner's request for a writ of habeas corpus. *See* Petitioner's Notice of Appeal, Eleventh Circuit, No. 99-12581-I (hereinafter referred to as "Petitioner's first notice of appeal"). Petitioner's first notice of appeal was construed by the Eleventh Circuit as a "motion for a certificate of appealability." (App. B). In an order signed by Circuit Judge Charles R. Wilson, the Eleventh Circuit denied Petitioner's motion for a certificate of appealability because Petitioner "failed to make a substantial showing of the denial of a constitutional right."[3] (App. B). On May 12, 2000, Petitioner filed a "Suggestion for Rehearing *En Banc*" requesting that the entire court review United States Circuit Judge Charles R. Wilson's decision to deny Petitioner's motion for a certificate of appealability.[4] The Eleventh Circuit Court of Appeals construed Petitioner's "Suggestion for Rehearing *En Banc*" as a motion for reconsideration and again denied Petitioner's motion for a certificate of appealability.[5] (App. A).

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3 Petitioner suggests that the Eleventh Circuit Court of Appeals did not indicate which notice of appeal it construed as a motion for a certificate of appealability. The Eleventh Circuit, however, clearly declared Petitioner's first notice of appeal as an application for a certificate of appealability. (App. B). Petitioner's second notice of appeal, which was filed as to the district court's decision to deny Petitioner's Motion for a Certificate of Probable Cause, was denied for lack of jurisdiction. (App. C).

4 In his brief in support of his "Suggestion for Rehearing *En Banc*," Petitioner proffers the same arguments as he does in this Petition for Writ of Certiorari.

5 A two-judge panel denied Petitioner's motion for a certificate of appealability because Petitioner "has not made a substantial

Petitioner's second notice of appeal was filed from the District Court's decision to deny Petitioner's motion for a certificate of probable cause. *See* Notice of Appeal, Eleventh Circuit, No. 99-14640-I (hereinafter referred to as "Petitioner's second notice of appeal"). On May 30, 2000, the Eleventh Circuit, Judges Edmondson, Cox and Wilson presiding, denied Petitioner's second notice of appeal for lack of jurisdiction. (App. C). The Court opined that the "district court's October 4, 1999, order denying [Petitioner's] petition for certificate of probable cause is not a final and appealable decision." (App. C).

Petitioner now brings this Petition for Writ of Certiorari claiming that 1) the Court of Appeals lacked authority to construe Petitioner's notice of appeal as an application for a certificate of appealability;[6] 2) the circuit judge lacked authority to deny Petitioner's certificate of appealability; 3) the decision of a single circuit court judge denying a certificate of appealability should be reviewed by the entire Eleventh Circuit Court of Appeals; and 4) according to Petitioner, the record reflects a substantial showing of a denial of a constitutional right.

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showing of the denial of a constitutional right." (App. A).

6 As explained in subsection A(1) of Respondent's Argument and Citation of Authority of this Brief, Respondent objects to Petitioner's first Question Presented to the extent that it applies to both Notices of Appeal.

II. ARGUMENT AND CITATION OF AUTHORITY

A. The Eleventh Circuit Court of Appeals is Authorized by Law to Construe Petitioner's First Notice of Appeal as a Motion for a Certificate of Appealability.

1. *The first Question Presented to this Court by Petitioner can only involve Petitioner's First Notice of Appeal.*

Petitioner filed two separate notices of appeal in the Eleventh Circuit Court of Appeals. *See* Petitioner's Notice of Appeal, No. 99-12581-I and Petitioner's Notice of Appeal, No. 99-14640-I. In his Brief in Support of his Petition for Writ of Certiorari, Petitioner states that the judge did not indicate which notice of appeal (No. 99-12581-I or No. 99-146401-I) the Eleventh Circuit construed as a motion for a certificate of appealability.[7] *See* Petition for Writ of Certiorari at 7, 9. Petitioner's contention, however, is incorrect. The Eleventh Circuit construed Petitioner's first notice of appeal as an application for a certificate of appealability. (App. B). By

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7 In his Petition for Writ of Certiorari, Petitioner states that he "assumed that the Court of Appeals relied on 28 U.S.C. § 2253 and Federal Rule of Appellate Procedure 22(b) in construing petitioner's notice of appeal as a motion for a certificate of appealability. The Petitioner also assumed that such meaning was given to both notices of appeal." Petition for Writ of Certiorari at 8.

contrast, Petitioner's second notice of appeal was dismissed for lack of jurisdiction.[8] (App. C).

Because the Eleventh Circuit only construed Petitioner's first notice of appeal as a certificate of appealability, Respondent Tuggle objects to Petitioner's first question presented to the extent that it applies to both notices of appeal. *See* Supreme Court Rule 15(2). Any argument by Petitioner stating that the Eleventh Circuit lacked authority to construe his second notice of appeal as a certificate of appealability is inconsistent with the record.

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8 According to the Order as to Petitioner's second notice of appeal, the District Court's decision to deny Petitioner's "motion for a certificate of probable cause" is not a final and appealable decision. (App. C). Whether a denial of a certificate of appealability is a final appealable decision is unclear. The Eleventh Circuit, along with two other circuits, have held that a denial of a certificate of appealability is not a final appealable decision. (App. C). *See* Johnson v. United States, 188 F.3d 507 (6th Cir. 1999) (stating that "[t]he denial of a certificate of probable cause, is not appealable"); Greenawalt v. Stewart, 105 F.3d 1268 (9th Cir. 1997) (holding that the district court's denial of a certificate of probable cause to appeal a final order in a habeas corpus proceeding is not an appealable order); Johnson v. Wells, 915 F.2d 1572 (6th Cir. 1990) (holding that "[a]n order denying a certificate of probable cause is not an appealable order under 28 U.S.C. § 1291"). This Court, however, suggested in Hohn v. United States, 524 U.S. 236, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998) that a denial of a certificate of appealability is a final appealable decision when it held that the Supreme Court had jurisdiction to review a denial of an application for a certificate of appealability. Petitioner has not presented this question to this Court.

2. *The Court of Appeals had the Authority to construe Petitioner's First Notice of Appeal as a Certificate of Appealability.*

28 U.S.C. § 2253 requires a certificate of appealability to be issued prior to the appeal of a district court's order in a habeas corpus proceeding. *See* 28 U.S.C. § 2253. Petitioner argues that "there is no specific provision in 28 U.S.C. § 2253(c) which authorized the Court of Appeals to construe a notice of appeal as a request for a certificate of appealability." Petition for Writ of Certiorari at 8. Petitioner, however, ignores the fact that the Federal Rules of Appellate Procedure and the Rules of the United States Court of Appeals for the Eleventh Circuit (hereinafter "Eleventh Circuit Rules") govern the disposition of applications for a certificate of appealability.[9] *See* Hohn v. United States, 524 U.S. 236, 242-243, 118 S.Ct. 1969, 1973, 141 L.Ed.2d 242 (1998); Fed. R. App. P. 22(b)(1) and 11th Cir. R. 22-1(c)(2).

Under the Federal Rules of Appellate Procedure and the Eleventh Circuit Rules, a district court judge and a circuit court judge have the authority to issue a certificate of appealability. *See* Fed. R. App. P. 22(b)(1); 11th Cir. R. 22-1(c)(2); *see also* Edwards v. United States, 114 F.3d 1083 (11th Cir. 1997). A district court judge, however, must consider and rule upon the

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9 The Federal Rules of Appellate Procedure govern procedure in the court of appeals. *See* Fed. R. App. P. 1(a). The Federal Rules of Appellate Procedure also give authority to "each court of appeals acting by a majority of its judges" to "make and amend rules governing its practice." Fed. R. App. P. 47(a)(1). The Eleventh Circuit has adopted local rules of appellate procedure. Accordingly, both the federal and local rules of appellate procedure govern this petitioner's notice of appeal and application for a certificate of appealability.

propriety of issuing a certificate of appealability before a request for a certificate of appealability will be received or acted upon by a circuit court judge.[10] *See* United States v. Monroe, 974 F.Supp. 1472 (N.D.Ga. 1997). Fed. R. App. P. 22(b) specifically states that the district court is required to "either issue a certificate of appealability or state why a certificate should not issue." In the case *sub judice*, the District Court denied Petitioner's Motion for a Certificate of Probable Cause because Petitioner failed to make a substantial showing of the denial of a constitutional right. (App. D).

If a district court judge denies an application for a certificate of appealability, as the District Court judge did in this case, the applicant may request a circuit court judge to issue a certificate of appealability. *See* Fed. R. App. P. 22(b)(2); 11th Cir. R. 22-1(c)(2). An appellate court, however, will not consider the merits of a petition for habeas corpus without a certificate of appealability. *See* 28 U.S.C. § 2253(c); Clements v. Wainwright, 648 F.2d 279 (5th Cir. 1981) (stating that an appeal may not proceed until a certificate of probable cause is issued).

Fed. R. App. P. 22(b)(2) specifically states that, "[a] request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, **the notice of appeal constitutes a request addressed to the judges of the court of**

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10 By requiring a district court to determine the propriety of a certificate of appealability prior to a circuit court's ruling on this issue, the rules allow the "court most familiar with the case to have the first word and allows the appellate court the great benefit of having the district judge's views on the need for an appeal." Edwards v. United States, 114 F.3d 1083, 1084 (11th Cir. 1997).

constitutes a request addressed to the judges of the court of appeals." (*Emphasis supplied*). Similarly, 11th Cir. R. 22-1(c)(1) states:

> if the District Court denies a certificate of appealability, and at the time of docketing the appeal in the court of appeals the applicant has not filed a renewed application for a certificate of appealability in the court of appeals, the application denied by the district court (construed and filed as a notice of appeal) **shall be construed by the court of appeals as a renewed application for a certificate of appealability.**

(*Emphasis supplied*)

In this case, Petitioner filed a Motion for a Certificate of Probable Cause in the District Court. At the same time, Petitioner filed his first notice of appeal in the Eleventh Circuit Court of Appeals seeking the review of the District Court's denial of Petitioner's request for a Writ of Habeas Corpus. When, as here, a certificate of appealability has not been granted by the district court, both the federal and local rules of appellate procedure require a notice of appeal to be construed as an application for a certificate of appealability. *See* Fed. R. App. P. 22(b)(1) and 11th Cir. R. 22-1(c)(2). Thus, the Eleventh Circuit had the authority and obligation to construe Petitioner's first notice of appeal as an application for a certificate of appealability. *See, e.g.*, Slack v. McDaniel, 529 U.S. 473, 120 S.Ct. 1595, 141 L.Ed.2d 542 (2000).

Since the Eleventh Circuit had express authority under 28 U.S.C. § 2253, Fed. R. App. P. 22(b) and 11th Cir. R. 22-1(c)(1) to construe Petitioner's notice of appeal as a motion for

certificate of appealability, this Petition for a Writ of Certiorari should be denied.

B. A Single Circuit Judge is authorized by Law to deny a Motion for Certificate of Appealability.

The United States Code and the federal and local rules of appellate procedure allow a single judge to decide whether to issue a certificate of appealability. *See* Fed. R. App. P. 22-1(b)(1) and 11th Cir. R. 27-1(d). "That [the United States Code and the federal and local rules] permit[] the certificate to be issued by a 'circuit justice or judge,' [however,] does not mean the action of the circuit judge in denying the certificate is his or her own action, rather than the action of the court of appeals to whom the judge is appointed." Hohn v. United States, 524 U.S. 236, 241-242, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998). To the contrary, the order is issued in the name of the court and under its seal. Hohn, 524 U.S. at 236, 242, 118 S.Ct. at 1969, 1973.

Petitioner argues that Fed. R. App. P. 22(b) and 28 U.S.C. § 2253(c) "do not expressly authorize a single judge to consider whether a certificate of appealability should be granted where no request for such certificate was made to the Court of Appeals." Petition for a Writ of Certiorari at 10. Petitioner's argument is without merit. This is true even if this Court construes the order signed by Circuit Judge Charles R. Wilson as an action taken by a "single judge."

The United States Code and the federal and local rules of appellate procedure specifically allow a single judge to rule on an application for a certificate of appealability. 28 U.S.C. § 2253(c) states that "[u]nless a **circuit justice or judge** issues a certificate of appealability, an appeal may not be taken to the

court of appeals from. . .the final order in a habeas corpus proceeding" (*Emphasis supplied*). Likewise, Fed. R. App. P. 22(b) forbids "an appeal unless a **circuit justice** or a **circuit or district judge** issues a certificate of appealability under 28 U.S.C. § 2253(c)." (*Emphasis supplied*). *See* Hohn, 524 U.S. at 244, 118 S.Ct. at 1974 (stating that Fed. R. App. P. 22 "by no means prohibits application to an individual judge, nor could it, given the language of the statute"). 11th Cir. R. 27-1(d) also states that "a **single judge** is authorized to act, subject to review by the court" on motions "for certificates of appealability." (*Emphasis supplied).*

Petitioner seems to suggest that Fed. R. App. P. 22(b) should not apply to this case because Petitioner did not file an express request for a certificate of appealability. Petition for Writ of Certiorari at 10-11. By filing his notice of appeal, however, Petitioner effectively filed an application for a certificate of appealability.[11] Fed. R. App. P. 22(b) states that "[i]f no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals." A request addressed to the judges of the court of appeals "may be considered by a circuit judge or judges as the court prescribes." Fed. R. App. P. 22(b). The result is the same under the Eleventh Circuit Rules which grant a single judge the authority to act on motions for certificates of appealability. 11th Cir. R. 27-1(d)(2).

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11 The Federal Rules and Eleventh Circuit Rules of Appellate Procedure mandate that a notice of appeal be construed as an application of a "certificate of appealability" if one has not been filed. *See* Fed. R. App. P. 22(b) and 11th Cir. R. 27-1(d)(2).

Both federal and local rules of appellate procedure require that a notice of appeal be construed as an application for a certificate of appealability. *See* Fed. R. App. P. 22(b) and 11th Cir. R. 22-1(c)(2). This is true even if this Court does not construe Petitioner's first notice of appeal as an "express request for a certificate." *See* Fed. R. App. P. 22(b).

C. Petitioner Was Not Entitled to an *En Banc* Review of Judge Wilson's Denial of His Application for a Certificate of Appealability.

Pursuant to the federal and local rules of appellate procedure, the action of a single judge may be reviewed by the court of appeals. Fed. R. App. P. 27(c) provides that the court of appeals "**may** review the action of a single judge." (*Emphasis added*). Similarly, 11th Cir. R. 27-1(d) states that "a **single** judge is authorized to act, subject to review by the court." (*Emphasis added*).

In this case, Judge Wilson's denial of Petitioner's application for a certificate of appealability was reviewed by a two-judge panel as provided by 11th Cir. R. 27-1(e). While Petitioner argues that the decision of the circuit judge is subject to "*en banc* review," Petitioner cites no authority to support his position. *See* Petition for a Writ of Certiorari at 11-13. To the contrary, pursuant to Fed. R. App. P. 35(a) "[a]n *en banc* hearing or rehearing is not favored and ordinarily will not be ordered." In fact, an *en banc* hearing will not be ordered unless it is 1) necessary to secure or maintain uniformity of the court's decisions; or 2) the proceeding involves a question of exceptional importance. *See* Fed. R. App. P. 35(a). Petitioner has not made any argument to even suggest that a rehearing *en banc* would bring uniformity to the court's decisions or that this case involves a question of exceptional importance.

It is probable that the Eleventh Circuit never intended a certificate of appealability to be subject to an *en banc* review by the court. The Eleventh Circuit Rules provide that "interim matters" such as "stay orders, injunctions pending appeal, appointment of counsel, leave to appeal *in forma pauperis*, and leave to appeal from a non-final order" are not subject to *en banc* consideration. 11th Cir. R. 35-4.

The Eleventh Circuit denied Petitioner's second notice of appeal from the District Court's denial of Petitioner's Motion for a Certificate of Probable Cause, because a certificate of appealability "is not a final and appealable decision." (App. C). According to this Order, the Eleventh Circuit construes motions for certificates of appealability as interim matters. As such, Petitioner's Suggestion for Rehearing *En Banc* was treated as "a request for rehearing or reconsideration" to "the judge or panel that entered the order sought to be reheard." 11th Cir. R. 35-4.

Upon review, a two-judge panel again denied Petitioner's application for a certificate of appealability because Petitioner "has not made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). (App. A). Since the Court reviewed the denial of Petitioner's certificate of appealability and an *en banc* review is not required, this Court should deny this Petition for a Writ of Certiorari.

D. Petitioner Is Not Entitled to a Certificate of Appealability Because the Record Does Not Support a Substantial Showing of a Denial of Any Constitutional Right.

A certificate of appealability will issue "only if the [petitioner] has made a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(2). "Such a

showing requires the applicant to demonstrate that the issues are debatable among jurists of reason, that a court could resolve the issues in a different manner, or that the questions are adequate to deserve encouragement to proceed further." Clark v. Johnson, 227 F.3d 273, 277 (5th Cir. 2000); *see* Greenawalt v. Stewart, 105 F.3d 1268 (9th Cir. 1997).

As stated earlier, a certificate of appealability should not be issued unless Petitioner exhibits a substantial showing of a denial of a constitutional right. *See* 28 U.S.C. § 2253. Both the District Court and the Eleventh Circuit Court of Appeals denied Petitioner's application for a certificate of appealability because Petitioner had not made a "substantial showing of the denial of a constitutional right." (App. B). Ruling upon Petitioner's Motion for Reconsideration, a two-judge panel agreed with the District Court and the circuit judge's decision to deny Petitioner's motion for a certificate of appealability. (App. A). Now, Petitioner requests that this Court grant a Writ of Certiorari to review the Eleventh Circuit's decision to deny Petitioner's application for a certificate of appealability. Pursuant to Hohn v. United States, 524 U.S. 236, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998), this Court may review a court's denial of an application for a certificate of appealability under 28 U.S.C. § 1254(1).

Petitioner proffers two reasons to support his contention that a certificate of appealability should issue. First, Petitioner contends that he was denied due process when he was indicted on a felony charge of aggravated assault but was convicted of misdemeanor battery. *See* Petition for a Writ of Certiorari at 13-20. Second, Petitioner argues that he was denied effective assistance of counsel when his attorney submitted the jury charge of misdemeanor battery and failed to submit the jury charges of self-defense and accident. *See* Petition for a Writ

of Certiorari at 13-20. As to both claims, Petitioner does not exhibit a substantial showing of a denial of a constitutional right.

Both of Petitioner's contentions stem from instructions given to the jury. "[A] federal court of appeals, [does] not have the final say on what instructions a [jury] charge must contain in order to accurately state Georgia law." Agan v. Vaughn, 119 F.3d 1538, 1545 (11th Cir. 1997). Instead, jury instructions are within the purview of the state courts because they are the final arbiters of state law. *See id.* Thus, a federal court's limited role on habeas review, when faced with a challenge to a state law jury charge, "is to determine whether any error or omission in the jury charge was so prejudicial as to amount to a violation of due process." Agan, 119 F.3d at 1538. Accordingly, a defendant's right to due process is not violated by a state law jury charge, unless such charge was so misleading as to make the trial unfair. *See* Estell v. McGuire, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); Pulley v. Harris, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984) ("A federal court may not issue the writ on the basis of a perceived error of state law").

In this case, the jury charge regarding misdemeanor battery was not so misleading as to make the trial unfair. To the contrary, the verdict was extremely lenient compared to the evidence presented at trial. (App. G at 51); *see* Emerson, 222 Ga.App. at 597, 474 S.E.2d at 640. "But for counsel's request for the battery charge, given the overwhelming evidence of guilt, it is highly likely that Emerson would have been convicted of aggravated assault." Emerson v. State, 222 Ga.App. 596, 474 S.E.2d 638 (1996). (App. G). Moreover, Petitioner's counsel requested the charge. (App. G at 54); Emerson v. State, 222 Ga.App. 596, 474 S.E.2d 638 (1996). Since Petitioner's due process rights were not violated, this

Court should not grant this Petition for Writ of Certiorari. (App. G); *see* Emerson v. State, 222 Ga.App. 596, 474 S.E.2d 638 (1996).

Petitioner's claim for ineffective assistance of counsel should also fail. To prevail on a claim of ineffective assistance of counsel, a petitioner must show (1) that counsel's performance was deficient; and (2) that the deficient performance prejudiced the defendant. *See* Holsomback v. White, 133 F.3d 1382 (11th Cir. 1998) (referring to Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). To determine whether counsel's performance was deficient, a court should consider the reasonableness of the challenged conduct. If the challenged conduct is unreasonable, Petitioner must also show that such conduct was prejudicial. A deficiency is prejudicial where "there is reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." White, 133 F.3d at 1386. Petitioner has not alleged nor can he prove such unprofessional errors. The Georgia Court of Appeals stated that "Emerson failed to demonstrate that he was prejudiced by what was undoubtedly a tactical decision." Emerson, 222 Ga.App. at 597, 474 S.E.2d at 638; (App. G at 52).

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Holsomback v. White, 133 F.3d 1382, 1387 (11th Cir. 1998). Whether a particular decision by counsel was a tactical one is a question of fact, and the state court's resolution of that issue enjoys a strong presumption of correctness. *See id.* at 1386. Whether a particular decision was reasonable, however, is a question of law which is reviewable *de novo*. *See id.* at 1387.

In the case *sub judice*, counsel's decisions were reasonable. According to the Georgia Court of Appeals, without counsel's charge on misdemeanor battery as a lesser included offense of assault, "given the overwhelming evidence of guilt, it is highly likely that Emerson would have been convicted of aggravated assault." Emerson, 222 Ga.App. at 597, 474 S.E.2d at 640; (App. G at 53). Likewise, Petitioner's counsel was not ineffective for failing to request the trial court to instruct the jury on the issues of accident and self-defense. (App. G at 60). *See* Emerson, 222 Ga.App. at 596, 474 S.E.2d at 638. Petitioner denied ever striking the victim. (App. G at 52); *see* Emerson, 222 Ga.App. at 596, 474 S.E.2d at 638. Thus, a request to charge on accident or self-defense would have been inappropriate because the evidence did not support either charge. (App. G at 52). *See* Emerson, 474 S.E.2d at 638; *see also* Peterson v. State, 212 Ga.App. 147, 441 S.E.2d 481 (1994).

Since Petitioner cannot show that the jury charges were so misleading as to constitute an unfair trial, he has not made a substantial showing of a denial of due process. Likewise, Petitioner has not shown that his counsel's performance was deficient or that he was prejudiced by any deficient performance. Accordingly, the Eleventh Circuit Court of Appeals did not err when it denied Petitioner's application for a certificate of appealability on the basis that he failed to make a substantial showing of the denial of a constitutional right. As a result, this Petition for Writ of Certiorari should be denied.

III. CONCLUSION

For the foregoing reasons and citations of authority, Respondent Tuggle respectfully requests that this Court deny the Petition for Writ of Certiorari.

This 20th day of November, 2000.

Respectfully submitted,
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APPENDIX I

FULL TEXT OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. § 1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

2. 28 U.S.C. § 2253 (c)

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or(B) the final order in a proceeding under section 2255.

3. Supreme Court Rule 15

2. A brief in opposition should be stated briefly and in plain terms and may not exceed the page limitations specified in Rule 33. In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived

misstatement made in the petition. Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition.

4. Fed. R. App. P. 1

(a) Scope of Rules.

(1) These rules govern procedure in the United States courts of appeals.

(2) When these rules provide for filing a motion or other document in the district court, the procedure must comply with the practice of the district court.

(b) Rules Do Not Affect Jurisdiction. These rules do not extend or limit the jurisdiction of the courts of appeals.

(c) Title. These rules are to be known as the Federal Rules of Appellate Procedure.

5. Federal Rule of Appellate Procedure 22

(b) Certificate of Appealability.

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. §§ 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. §§ 2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. The district clerk

must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

(2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.

6. Federal Rule of Appellate Procedure 27

(c) Power of a Single Judge to Entertain a Motion. A circuit judge may act alone on any motion, but may not dismiss or otherwise determine an appeal or other proceeding. A court of appeals may provide by rule or by order in a particular case that only the court may act on any motion or class of motions. The court may review the action of a single judge.

7. Federal Rule of Appellate Procedure 35

(a) When Hearing or Rehearing En Banc May Be Ordered. A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the proceeding involves a question of exceptional importance.

8. Fed. R. App. P. 47(a)(1)

a) Local Rules.

(1) Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice. A generally applicable direction to parties or lawyers regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order. A local rule must be consistent with--but not duplicative of--Acts of Congress and rules adopted under 28 U.S.C. §§ 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. Each circuit clerk must send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended.

9. 11th Circuit Rule 22-1

(c) When an application for a certificate of appealability is acted upon by the district court, but the applicant has not filed a notice of appeal:

(1) the district court shall construe the application for a certificate of appealability as also a notice of appeal, and file it as such; and

(2) if the district court denies a certificate of appealability, and at the time of docketing the

appeal in the court of appeals the applicant has not filed a renewed application for a certificate of appealability in the court of appeals, the application denied by the district court (construed and filed as a notice of appeal) shall be construed by the court of appeals as a renewed application for a certificate of appealability.

10. 11th Circuit Rule 27-1

(d) Motions Acted Upon by a Single Judge. Under FRAP 27(c), a single judge may, subject to review by the court, act upon any request for relief that may be sought by motion, except to dismiss or otherwise determine an appeal or other proceeding. Without limiting this authority, a single judge is authorized to act, subject to review by the court, on the following motions:

(2) for certificates of appealability under FRAP 22(b) and 28 U.S.C. §§ 2254;

(e) Two-Judge Motions Panels. Specified motions as determined by the court may be acted upon by a panel of two judges.

11. 11th Circuit Rule 35-4

Administrative and interim matters (such as stay orders, injunctions pending appeal, appointment of counsel, leave to appeal in forma pauperis, and leave to appeal from a non-final order) are not subject to en banc consideration under FRAP 35. En banc petitions will not be entertained in such matters but will be referred as a request for rehearing or reconsideration to the

judge or panel that entered the order sought to be reheard.

APPENDIX H

474 S.E.2d 638

222 Ga.App. 596

Court of Appeals of Georgia.

EMERSON
v.
The STATE.
No. A96A1162.
Aug. 5, 1996.
Reconsideration Denied
Aug. 23, 1996.

Certiorari Denied Nov. 22, 1996.

Defendant, who was indicted on charge of aggravated assault, was convicted upon jury verdict in Superior Court, Clayton County, Simmons, J., on lesser offense of misdemeanor battery. Defendant appealed. The Court of Appeals, Harold R. Banke, Senior Appellate Judge, held that: (1) jury instruction on battery did not constitute reversible error; (2) defense counsel's request for charge on battery did not constitute ineffective assistance; and (3) counsel's failure to request charges on self-defense and accident did not constitute ineffective assistance of counsel.

Affirmed.

John Alan Emerson was indicted on a charge of aggravated assault, but convicted on the lesser offense of misdemeanor battery. He enumerates five errors, most of

which challenge the jury instructions trial counsel requested or failed to request.

The State's evidence at trial revealed that this case arose after the victim, Emerson's supervisor at Delta Airlines, instructed Emerson to leave the break area and get back to work. Another employee informed the victim that after receiving this instruction Emerson had thrown his coffee all over the break area. The victim then located Emerson, instructed him to clean up the mess, and went into an office to use the telephone. Emerson walked into the office, admitted that he was about to "lose it," and struck the victim in the head with a crowbar. The resulting laceration required 14 staples. The victim then struggled with Emerson, who had raised the crowbar to strike again. The victim subsequently filed a civil suit against Emerson. Held:

1. The trial court did not commit reversible error by instructing the jury on battery because Emerson's counsel requested the charge. Such self-induced error cannot be complained of on appeal. Griffith v. State, 188 Ga.App. 789, 790, 374 S.E.2d 359 (1988). Therefore, we need not reach Emerson's arguments that the conviction violated his due process rights.

2. We reject Emerson's contention that his counsel was ineffective for (a) requesting the charge on battery; (b) failing to request a charge on self-defense; and (c) failing to request a charge on accident. To establish ineffectiveness, a defendant must prove that his trial [222 Ga.App. 597] counsel's performance was deficient and the deficiency prejudiced his defense to the extent that there was a reasonable probability the result of the trial would have been different but for defense counsel's unprofessional deficiencies. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674

(1984); Brown v. State, 257 Ga. 277, 278(2), 357 S.E.2d 590 (1987). Review of counsel's performance, however, must be highly deferential. Rogers v. State, 195 Ga.App. 446, 448(2), 394 S.E.2d 116 (1990). Tactical errors do not constitute ineffective assistance. Keanum v. State, 212 Ga.App. 662, 664(3), 442 S.E.2d 790 (1994). Moreover, we need not inquire into counsel's alleged deficiency, absent a showing of prejudice. Trammel v. State, 265 Ga. 156(1), 454 S.E.2d 501 (1995).

(a) Emerson failed to make the requisite showing of prejudice with regard to his assertion that counsel was ineffective for requesting the battery charge. The evidence against Emerson was overwhelming. In addition to the victim's testimony, other corroborating witnesses saw Emerson argue with the victim, throw the coffee, retrieve his crowbar from his tool chest, follow the victim with crowbar in hand, raise the crowbar, and swing it. They also testified to breaking up the ensuing struggle. But for counsel's request for the battery charge, given the overwhelming evidence of guilt, it is highly likely that Emerson would have been convicted of aggravated assault. *See* Postell v. State, 212 Ga.App. 868, 870, 443 S.E.2d 530 (1994). Because Emerson failed to demonstrate that he was prejudiced by what was undoubtedly a tactical decision, the trial court did not clearly err in finding that Emerson's counsel was not ineffective. Powell v. State, 210 Ga.App. 409, 414(6)(c), 437 S.E.2d 598 (1993).

(b) Emerson's counsel was not ineffective for failing to request a charge on self-defense because the evidence did not support that charge. Emerson's counsel testified that before trial Emerson denied ever striking the victim with the crowbar, a statement in keeping with Emerson's trial testimony. Because such testimony was inconsistent with the theory that Emerson struck the victim with the crowbar in self-defense, the decision

not to request that charge was appropriate. Peterson v. State, 212 Ga.App. 147, 152(4), 441 S.E.2d 481 (1994).

(c) This same reasoning applies to Emerson's claim of ineffectiveness for failing to request an accident charge. Emerson's denial that he struck the victim with the crowbar at all foreclosed a claim that he struck the victim by accident. *See id.*

Judgment affirmed.

McMURRAY, P.J., and RUFFIN, J., concur.